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TO: Mr. Jeff S. Jordan, Esq.

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COMPANY: Federal Election Commission

FROM: Mathew D. Staver, Esq.

DATE: August 30, 2004

RE: MUR 5491

Number of pages including this cover page: 32

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Comments: Following is the Response of Jerry Falwell Ministries, Inc. and The Liberty Alliance, Inc. in MUR 5491, that is due on this date.

FEDERAL
ELECTION
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OFFICE OF
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August 31, 2004

VIA FACSIMILE
AND U.S. MAIL

Mr. Jeff S. Jordan, Esq.
Office of the General Counsel
Federal Election Commission
999 E. Street, NW
6th Floor
Washington, DC 20463

Re: MUR 5491, Response of Jerry Falwell Ministries, Inc. and The Liberty Alliance, Inc.

Dear Mr. Jordan:

This is the response of our clients, Jerry Falwell Ministries, Inc. ("JFM") and The Liberty Alliance, Inc. ("LA"), to the complaint in the above-captioned matter under review. The Campaign Legal Center ("CLC") alleges that our clients violated three provisions of the Federal Election Campaign Act ("Act"), specifically, 2 U.S.C. 441b(b)(2)(A) (corporate expenditures); 2 U.S.C. § 441b(b)(4)(A)(i) (corporate solicitation); 2 U.S.C. § 441d (disclaimers); and the implementing regulations of those sections.¹

The complaint fails to meet the requirements set forth in 11 C.F.R. § 111.4(c). The complaint does not differentiate which statements are based upon personal knowledge and which statements are based upon information and belief. For this reason alone the complaint should be dismissed.

¹See Compl. 5-6.

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Without waiving the right to object to the complaint on procedural grounds, this response will address the allegations made in the complaint and demonstrates that there is no factual or legal basis for the Commission to find reason to believe that any violation of federal campaign finance laws has occurred. The Commission should dismiss the complaint.

LEGAL ANALYSIS

I. **THE *FALWELL CONFIDENTIAL* IS ENTITLED TO THE FEDERAL ELECTION CAMPAIGN ACT'S PRESS EXEMPTION.**

Although the Federal Election Campaign Act (hereinafter "Act") prohibits corporations from making certain political expenditures², the Act provides a "press exemption" for commentaries or editorials that are (1) distributed through regular publications; and (2) not controlled by a political party, political committee or candidate. 2 U.S.C. § 431(9)(B)(i).³ The *Falwell Confidential* meets the press exemption requirements because (1) it is a commentary or editorial⁴ distributed in

²The Act provides that it is unlawful for a corporation to make an "expenditure in connection with any election at which presidential and vice presidential electors . . . are to be voted for . . ." with an exception for "communications by a corporation to its stockholders and executive or administrative personnel and their families" 2 U.S.C. §§ 441b(a) and (b)(2). The communications forbidden by § 441b(a) are limited to "express advocacy."

³The definition section of the Act states that an "expenditure" does not include "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i).

⁴There are no definitions in the statute for the words "commentary" or "editorial." The dictionary definition of commentary is "an expression of opinion." See *Miriam-Webster Online Dictionary*, <<http://www.m-w.com/cgi-bin/dictionary>> (visited August 10, 2004). Another definition is "a written explanation or criticism or illustration that is added to a book or other textual material." See *Free Dictionary*, <www.freedictionary.com> (visited August 10, 2004). One definition of an editorial is "a newspaper or magazine article that gives the opinions of the editors or publishers," or "an expression of opinion that resembles such an article." See *Miriam-Webster Online Dictionary*, <<http://www.m-w.com/cgi-bin/dictionary>> (visited August 10, 2004). Another common definition of an editorial is "an article giving opinions or perspectives." See *Free Dictionary*,

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periodicals³; and (2) the periodicals are not controlled by a political party, political committee or candidate.

A. The *Falwell Confidential* Is Entitled To The Press Exemption Because It Is A Commentary Or Editorial Distributed In Newspapers And Periodicals.

The *Falwell Confidential*, Dr. Jerry Falwell's weekly editorial column, is distributed widely in the United States and around the world as his personal opinion commentary. The *Falwell Confidential* reflects the personal opinions of Dr. Jerry Falwell and are not official statements of JFM or LA. LA is the sole sponsor of falwell.com, the web site that is the subject of the complaint, which posts the *Falwell Confidential* each week. JFM does not own or control falwell.com. The complaint does not show any connection between the *Falwell Confidential* and JFM. A newspaper article that is attached to the complaint as Exhibit 3 calls falwell.com "the Jerry Falwell Ministries Web site," but this statement is not true. The web site belongs to LA, not JFM. Although Dr. Falwell originally founded Liberty Alliance, he is not an employee, director or officer of the corporation. A founder of a corporation who is not an officer, director or employee cannot be said to be the organization. The column is the opinion of Dr. Falwell, not LA, although it is protected speech no matter who is the source. "The inherent worth of the speech in terms of its capacity for informing the public does not depend on the identity of its source." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) (invalidating state campaign expenditure law on First Amendment grounds).

That the column in question represents Dr. Falwell's personal opinion is evident. The column

<www.freedictionary.com> (visited August 10, 2004).

³A periodical is a publication "published with a fixed interval between the issues or numbers." See *Miriam-Webster Online Dictionary*, <<http://www.m-w.com/cgi-bin/dictionary>> (visited August 10, 2004). The *Falwell Confidential* is published weekly.

sub judice states: "For conservative people of faith, voting for principle this year means voting for the re-election of George W. Bush. The alternative, *in my mind*, is simply unthinkable."; "*I believe it is the responsibility of every political conservative . . .*" *I am urging everyone* reading this column today . . ."; and "*I honestly believe that it is essential . . .*" Dr. Falwell is a well-known media personality who is very involved in television, radio and publishing.

Dr. Falwell frequently speaks as an individual in many different capacities and venues. Almost weekly he appears on national television news talk programs, and most weeks he appears on or is quoted by multiple TV, radio and print media. Dr. Falwell is the publisher of the *National Liberty Journal* newspaper, Chancellor of Liberty University and Pastor of Thomas Road Baptist Church. He currently hosts the television program *Liberty Today* and hosted the television program *Listen America* for many years. He founded a radio station, a television station, and a cable TV network called *The Liberty Channel*, all of which continue to operate on the property of Thomas Road Baptist Church and Liberty University.

The *Falwell Confidential* is not a publication of JFM or LA, but even if it were, the statements at issue in this matter would not violate the prohibition against a corporation making a prohibited "expenditure," since the *Falwell Confidential* is a commentary or editorial that distributed in other regular publications. For example, Exhibit 2 of the complaint contains an editorial commentary written by Dr. Falwell entitled "*Gary Bauer on the Political Frontlines*." The first section of Exhibit 2, beginning on page one with the word "Always" and continuing half-way down page two and ending with the word "history", contains the *exact* same text as Dr. Falwell's column published on Newsmax.com, a daily internet newspaper, on July 1, 2004, which is the same day it

was the column was sent via email and published as his personal opinion on the LA web site.⁶ See Exhibit 1, attached herewith. Dr. Falwell has no association with Newsmax.com other than being a regular contributor to this daily internet newspaper. His articles that were published from August 31, 2001 until the present are archived on the newspaper's web site.⁷

WorldNetDaily published the same commentary on July 3, 2004, but entitled it *Time to Open Wallets for Bush*. The commentary is copyrighted by WorldNetDaily, not LA, as follows: "© 2004 WorldNetDaily.com."⁸ See Exhibit 2, attached herewith. Dr. Falwell has no association with this daily internet newspaper other than being a weekly columnist for WorldNetDaily.⁹ Indeed, the *Falwell Confidential*, which is sent via email to subscribers weekly and published by LA, is published by WorldNetDaily on Saturday. WorldNetDaily has archived articles written for its online newspaper by Dr. Falwell from October 20, 1999 to the present.¹⁰ The *Falwell Confidential* is clearly

⁶Jerry Falwell, *Gary Bauer on the Political Frontlines* (visited Aug. 10, 2004) <www.newsmax.com/archives/articles/2004/7/1/165807.shtml> or go to <http://www.newsmax.com> and type "Gary Bauer on the Political Frontlines" in the "Search NewsMax" search box to find the article. Newsmax.com is an internet newspaper that describes itself as "America's News Page."

⁷See articles archived at <http://www.newsmax.com/pundits/archives/Jerry_Falwell_archive.shtml>. Neither JFM nor LA are mentioned as the source of the articles written by Dr. Falwell.

⁸Jerry Falwell, *Time to Open Wallets for Bush* (visited Aug. 10, 2004) <http://worldnetdaily.com/news/article.asp?ARTICLE_ID=39260> or go to <http://www.worldnetdaily.com> click on "writer archives," scroll down to "Commentary" and click on "Jerry Falwell," scroll down to article "Time to Open Wallets for Bush."

⁹See WorldNetDaily web site where Jerry Falwell appears under "Weekends" in the "Columnists" sidebar on the left side of the page (visited Aug. 10, 2004) <<http://worldnetdaily.com/commentary.asp#columnists>>. Note that neither JFM nor LA are mentioned as the source of the articles written by Dr. Falwell. WorldNetDaily describes itself as "A Free Press For A Free People."

¹⁰Rev. Jerry Falwell, *Listen America Archives* (visited Aug. 10, 2004) <http://worldnetdaily.com/news/archives.asp?AUTHOR_ID=31&PAGE=24>.

Dr. Falwell's personal commentary that is distributed weekly through various online and print periodical publications, and as such, is entitled to the press exemption.¹¹

The legislative history of the Act, which states that there is an "unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns," indicates Congress recognized that a free press is more important than concerns over campaign finance.¹² In *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the United States Supreme Court reviewed the legislative history of the press exemption, stating:

[T]he House of Representatives' Report on this section states merely that the exemption was designed to "make it plain that it is not the intent of Congress in the present legislation to limit or burden in any way the first amendment freedoms of press or of association. (The exemption) assures the *unfettered right* of the newspapers, TV networks, and other media to cover and comment on political campaigns."

Id. at 250 (1986) (quoting H.R.Rep. No. 93-1239, p.4 (1974) (emphasis supplied)).

Neither JFM or LA wrote the complained of article, Dr. Falwell did. The article is the personal opinion of Dr. Falwell, not a political endorsement of LA or JFM. Nowhere does any

¹¹The *Falwell Confidential* weekly editorial column solely the personal opinion of Dr. Falwell. Dr. Falwell has as much freedom to express his opinion in the *Falwell Confidential* as he does in his regular column published by Newsmax.com and WorldNetDaily.com. In fact, there are at least two or more copyright holders (i.e., owners) of the *Falwell Confidential* article in question, LA and WorldNetDaily.com. The article that appeared in WorldNetDaily.com (the same day it was emailed and appeared on the LA web site) contains the text, except for two differences. The WorldNetDaily.com article was published under a different article title, and it contains only the article in question and not the remaining portion of the *Falwell Confidential* posted by LA that deals with entirely unrelated matters. As already noted, WorldNetDaily.com explicitly noted that it had the copyright on the article. The separate copyright is permissible since WorldNetDaily.com, not Dr. Falwell, chose a different name for the article than that which appeared on the email version of the *Falwell Confidential*. Although, not expressly referenced as a copyrighted piece, it is arguable that Newsmax.com also has a copyright on the article.

¹²See H.R.Rep. No. 93-1239, p.4 (1974).

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version of the article mention LA or JFM; only Dr. Falwell is mentioned, and the article contains numerous personal pronouns pointing back to Dr. Falwell as an individual. LA posts many articles on its web site.¹³ In addition to posting the text of Dr. Falwell's *Falwell Confidential*, LA posts articles by other writers, and as such LA is merely acting as a member of the press in the same way as Newsmax.com, WorldNetDaily.com and other media that publish Dr. Falwell's personal opinions.

In August 2003, three Commissioners signed a Statement of Reasons outlining their "support for a more straightforward approach to cases raising the press exemption" *In re Wal-Mart Stores, Inc.*, MUR 5315, Statement of Reasons, Vice Chairman Bradley A. Smith and Commissioners Michael E. Toner and David M. Mason, August 25, 2003, p. 1. In MUR 5315, the Commission voted unanimously to dismiss a complaint against Wal-Mart and Sam's Club publishing a favorable article on Senate candidate Elizabeth Dole, including a photograph of her with a child wearing a Dole campaign sticker. The matter was dismissed because of the low score in the Enforcement Priority System. The low score was due in part to the fact that the matter appeared to qualify for the press exemption. The Statement of Reasons recognized that the Commission should, due to its regulations, the Act and the First Amendment, "dismiss cases that present us with nothing more than a feature in a periodical about a candidate, unless the evidence shows that the periodical is owned or controlled by a candidate, political committee or political party." MUR 5315, Statement of Reasons, p. 1. Although there was a question regarding whether the Wal-Mart/Sam's Club mailer was a periodical or whether it was an advertising piece, the Commission voted to dismiss the matter.

Whether a media outlet is "for profit" or "not for profit" is irrelevant, as pointed out in by the

¹³For example, falwell.com has frequently featured opinion articles by Dr. Ergun Mehmet Caner, a professor of Theology and Church History at Liberty University. See <<http://falwell.com>> and scroll down to the article by Dr. Caner (last visited August 30, 2004).

three Commissioners in the matter of Wal-Mart and Sam's Club:

"We see no justification for a narrower application of the exemption grounded in a notion that some publishers are bona fide while others are not. . . . We do not think the Commission should consider whether a publisher makes a profit from its publications. If that were the standard, then many prominent 'think magazines' that are significant in the Washington debate would not qualify for the press exemption. We cannot see much sense in an exemption that would protect *People* but not *The New Republic*. . . . Nor should the Commission examine whether the publication has paid subscribers"

MUR 5315, p. 3.

The press exemption should be broadly construed to insulate the content of publications (and the editorial judgment of publishers) from regulation. It would be discriminatory to take action against JFM and LA for personal editorial opinions expressed by Dr. Falwell in the *Falwell Confidential* while ignoring the commercial mailing of Wal-Mart/Sam's Club. While the complaint against Wal-Mart/Sam's Club was dismissed even though there was a question about whether mailer was a periodical or an advertising piece, here there is no question that the *Falwell Confidential* is a weekly periodical. There is also no question that the *Falwell Confidential* is published and re-published by various other media with whom Dr. Falwell has no association other than being a regular contributing columnist. LA is merely one of many other media that publishes the *Falwell Confidential*.¹⁴ The *Falwell Confidential*, and the media that publish it, are entitled to the press exemption.¹⁵

¹⁴As already pointed out, the web site is owned by LA, not JFM. JFM has nothing to do with the allegations in the complaint, and the complaint presents no evidence of any connection between either LA or the *Falwell Confidential*.

¹⁵The *Falwell Confidential* is similar to a syndicated column which is published by various media, except to the extent that Dr. Falwell receives no compensation from authoring the column. Nor do LA or JFM receive any compensation Dr. Falwell's columns.

Newspapers and other media regularly endorse candidates each election.¹⁶ One need only open the editorial page of the local newspaper or visit their online versions to see the press exemption in action. For example, on June 16, 2004, the *Philadelphia Daily News* endorsed John Kerry for President. The paper published the article on its web site, which was entitled "KERRY FOR PREZ: WHY HIM, WHY NOW AND HOW TO PUT HIM IN THE WHITE HOUSE." See Exhibit 3, attached herewith. The article concluded "Finally, you can learn more about Kerry, make a donation or volunteer to help through his Web site: www.johnkerry.com. You can help Kerry win Pennsylvania. Act now. The commonwealth – indeed the nation – cannot afford another four years of George Bush."¹⁷

CLC has not targeted the www.philly.com web site for endorsing Kerry, for providing links to his website to raise funds and for failing to post disclaimers on the web site. Nor would such a challenge succeed. "[A] newspaper corporation must necessarily have the liberty to endorse a political candidate in its editorial columns. . . ." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 825, n.4 (1978) (invalidating state campaign expenditure law on First Amendment grounds). Each election cycle, it is common to see media endorsing or opposing political candidates, and it is even more common to read the personal views of columnists published broadcasted or published by the media, including the opinions expressed in letters to the editor.

The *Falwell Confidential* editorial, and the media that publish it, including LA, are entitled

¹⁶"The media should be accorded the widest latitude and freedom to endorse and promote candidates and issues of their choosing as, within their judgment, is warranted." *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 834 (6th Cir.1988), *affirmed*, 491 U.S. 657 (1989).

¹⁷*Kerry for Prez: Why Him, Why Now and How to Put Him in the White House* (visited Aug. 10, 2004) <<http://www.philly.com/mld/dailynews/news/opinion/8933725.htm?1c>>.

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to the same press exception deference as the *Philadelphia Daily News* editorial. Editorials and commentaries are simply opinions about which candidates or political committees are worthy of support. It is indeed the right of the press to make such opinions public. While the Commission may choose to investigate statements to consider whether they meet the requirements of the press exemption, the Commission can go no further without evidence that a candidate or political committee has orchestrated the publication. The Commission's power to investigate, like other "power[s] of compulsory process (must) be carefully circumscribed when the investigative process tends to impinge on such highly sensitive areas of freedom of speech or press, freedom of political association, and freedom of communication of ideas." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957).

If the Commission applied the Act to the *Falwell Confidential* commentary, LA or JFM, such action would violate the press exemption in the Act and would also violate the freedom of the press and freedom of speech provisions of the First Amendment of the United States Constitution.

B. The *Falwell Confidential* Is Entitled To The Press Exemption Because It Is Not Sponsored By Any Candidate Or Political Organization.

Neither a political party, a political committee or political candidate control LA, JFM or Dr. Falwell. The Commission has no jurisdiction to investigate complaints about statements in the press that are related to the function of the press, which includes printing editorials and commentaries, so long as neither the candidates nor the political committees control the press. Since the *Falwell Confidential* is commentary or editorial that is published in a regular publication, unless there is evidence that the publication is sponsored by a candidate or a political organization, the Commission must dismiss the complaint. The *Falwell Confidential* is not politically controlled; it is a

commentary by Dr. Falwell that is published by various media, internet and otherwise, including falwell.com, the web site owned by LA.¹⁸

If there is no evidence that a candidate, political committee, or political organization is behind the publication, the Commission lacks jurisdiction to conduct further investigation. In *Massachusetts Citizens for Life*, the Supreme Court discussed some district court cases regarding the press exemption. See 479 U.S. at 251, n.5. In one of these cases cited favorably by the High Court, the district court ruled that a publisher need not comply with Commission interrogatories regarding promotional materials deemed by the Commission to violate election laws, since there was no evidence that a particular candidate or political organization was behind the publication. See *FEC v. Phillips Publishing Co.*, 517 F.Supp. 1308, 1310, 13-14 (D.C. 1981). In that case, the publisher's statements, which directly opposed Senator Edward Kennedy for president, were not in a regular publication; they were sent in a letter to solicit subscriptions.¹⁹ Since there was no evidence that Senator Kennedy controlled the publisher, the Court refused to force the publisher to provide information to the Commission because of the "danger further FEC inquiry would impinge upon First Amendment freedoms." *Id.* at 1314.

In another case cited favorably by the Supreme Court, a district court ruled that if distribution

¹⁸Again, for purposes of this discussion, JFM is irrelevant since JFM has nothing to do with the distribution of the *Falwell Confidential* via email nor posting the column on the web site, which is owned by LA, not JFM.

¹⁹The letter contained several statements opposing Senator Kennedy: (1) "We must stop Kennedy before he seizes the Presidency;" (2) "You can help with this effort to stop Teddy Kennedy;" (3) "You learn how you can use this valuable information to help defeat Teddy Kennedy's drive for the Presidency;" (4) "Whether you are a man or woman, young or old, a businessman, teacher, student, employee, employer, union member or government worker you can actually help combat Teddy Kennedy and advance the cause of conservatism in America." *Id.* at 1310.

of video tapes of a computer reenactment of Senator Kennedy's accident at Chappaquiddick was related to the publisher's press function, the press exemption applied, and the Commission could not investigate further. *See Reader's Digest Ass'n. v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981).

The press exemption clearly protects the *Falwell Confidential*, and the media that published or re-published it, including LA and, most assuredly, JFM, which has nothing to do with the publication complained of in the complaint. Further investigation by the Commission is not permitted since there is no evidence that any campaign or political association has orchestrated the publication of the material. No allegations have been made in the complaint that the *Falwell Confidential* was in any way sponsored by President Bush's campaign.

II. APPLYING FEDERAL CAMPAIGN FINANCE RESTRICTIONS ON INDEPENDENT EXPENDITURES TO LIBERTY ALLIANCE IS UNCONSTITUTIONAL.

Although no further argument is necessary once the press exemption is deemed applicable, LA and JFM advance a second argument to support the dismissal of the complaint.²⁰ LA is not bound by the independent expenditure restrictions²¹ because it meets the exemption requirements set forth in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263

²⁰ Although not wanting to sound like a broken record, it bears repeating that JFM had nothing to do with the publication of the *Falwell Confidential* editorial, nor does JFM own the web site that published the article. The fact that JFM is mentioned in any argument in this response should not be taken as an admission that JFM needs to present any legal defense. JFM is not involved in any allegations raised in the complaint, nor has the complaint presented any relationship to the allegations. That's all that needs to be said for JFM. No other argument is necessary.

²¹ Independent expenditures are afforded far greater First Amendment protection than coordinated expenditures and direct candidate contributions. *See FEC v. Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 457-60 (2001).

(1986) (hereinafter "*MCFL*").²² Organizations that meet certain requirements qualify for the "*MCFL* exemption."²³ The United States Supreme Court has identified three criteria that insulates an organization from application of federal restrictions on independent spending.

First, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities Second, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. . . . Third, [it] was not established as a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 263-64.

LA meets all three of the *MCFL* criteria. First, LA is not a business corporation. It is a nonstock, not-for-profit, 501(c)(4) educational and lobbying organization. LA owns the web site falwell.com and is responsible for the posting of materials on the web site.²⁴ As stated in its Articles of Incorporation, LA is a social welfare organization whose purposes are educational and political, not commercial:

(1) To seek morality in American life and government; (2) To return the family to its

²²The Fourth Circuit determined that the Supreme Court's criteria were "an application, in three parts, of First Amendment jurisprudence to the facts in *MCFL*." *North Carolina Right to Life v. Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000).

²³*See, e.g. McConnell v. FEC*, 251 F. Supp. 2d 176, 185 (D.C. Cir. 2003).

²⁴LA posts information on its web site regarding separate entities including, Jerry Falwell Ministries, Inc., Liberty University, Thomas Road Baptist Church, National Liberty Journal Newspaper, Old Time Gospel Hour and Liberty Godparent Home for Unwed Mothers. *See* <<http://falwell.com/?a=about>> (visited Aug. 10, 2004). LA also posts links to various organizations on its web site, including, Liberty University, Liberty University School of Law, Liberty Baptist Theological Seminary, Thomas Road Baptist Church, The Liberty Channel, Liberty Godparent Home, National Liberty Journal, Maranatha Christian Journal, I Believe.com, Worthy News, WORLD, Christian Portal Homepage, BC Christian News, Liberty Counsel, The Claremont Institute, Eagle Forum, Concerned Women for America, American Family Association, Family Research Council, The American Center for Law and Justice, and Focus on the Family. *See Falwell.com Links* at <<http://falwell.com/?a=links>> (visited Aug. 10, 2004).

ordained place in American life; (3) To engage in nonpartisan research, study and analysis, for the benefit of the general public, regarding the political structure of the United States; (4) To engage in nonpartisan research, study and analysis, for the benefit of the general public on those questions affecting the public interest with respect to both the public and private sectors, and to publish the results of such study; (5) To prepare educational materials and conduct educational activities in support of the general purposes of the Corporation; (6) To conduct and sponsor forums, lectures, debates and similar programs; (7) To assist other charitable, educational and social welfare organizations in the conduct of similar activities; (8) To establish in the main office or elsewhere all departments and activities necessary to carry out the purposes of the corporation; (9) To engage in any and all lawful activities incidental to the foregoing purposes except as restricted herein.

Purposes 1 through 8 are also listed on LA's web site as goals of the organization.²⁵

Since LA is a nonprofit social welfare organization formed for the purpose of expressing social and political ideas, it meets the first criteria of *MCFL*, which the Court said would insure "that political resources reflect political support." *MCFL*, 479 U.S. at 264.

Second, LA has no shareholders other persons who would have an "economic disincentive for disassociating with it if they disagree with its political activity." *Id.* Thus, LA meets the second *MCFL* criteria.

Third, LA is not a business corporation or labor union. Although it does not have a policy of not accepting corporate donations, it is overwhelmingly funded by private contributions from individuals, which "prevents corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace." *Id.* During the past five years, LA has received less than 1% of its donations from corporations. Nonprofit organizations meeting the requirements of 11 C.F.R. § 114.10 are exempt from the independent expenditure prohibitions, but the Fourth Circuit recognized that section as "merely a rigid codification of the factors in *MCFL*" *See Beaumont*

²⁵ See *Mission Statement* at <<http://falwell.com/?a=about>> visited Aug. 10, 2004.

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v. *FEC*, 278 F.3d 261, 273 (4th Cir. 2002), *rev'd on other grounds*, 539 U.S. 146 (2003).²⁶ The court held the section unconstitutional as applied to the nonprofit corporation, North Carolina Right to Life (hereinafter "NCRL"), because it applied the third criteria too strictly. *Id.* While NCRL did not have a policy against accepting corporate donations, only between zero and eight percent of NCRL's total revenues were from corporations. *Id.* at 273. The court ruled that the NCRL could be exempt and still accept a small amount of corporate donations. *Id.* The indirect expenditure limit was thus held unconstitutional as applied to NCRL. *Id.*

LA meets the *MCFL* exemption requirements. The application of the independent spending restrictions of 2 U.S.C. §441b would be unconstitutional if applied to LA, "for it infringes protected speech without a compelling justification for such infringement." *MCFL*, 479 U.S. at 263.

III. A DISCLAIMER IS NOT REQUIRED FOR EITHER THE FALWELL.COM WEB SITE OR THE FALWELL CONFIDENTIAL EMAIL.

The complaint erroneously states that failing to post the disclaimers required by 11 CFR §110.11 on the falwell.com web site and in the *Falwell Confidential* sent by email is a "clear violation of the law."²⁷ Although disclaimers are required in some political communications, the applicable regulations do not apply to the *Falwell Confidential*. The disclaimer requirement of 11 CFR §110.11 is limited to "public communications, defined for this section to include the communications at 11 CFR 100.26 plus unsolicited electronic mail of more than 500 substantially similar communications and Internet web sites of political committees available to the general

²⁶The Supreme Court only considered the constitutionality of the ban on direct contributions. *See Beaumont*, 539 U.S. at 151.

²⁷*See Compl.* at 5.

public, and electioneering communications” 11 CFR §110.11.²⁸ The falwell.com web site is not a “public communication.”²⁹ The falwell.com web site is not required to contain a disclaimer in order to post the *Falwell Confidential* since the web site does not belong to a political committee.

Disclaimers are not required for email unless the email is “unsolicited electronic mail of more than 500 substantially similar communications.” 11 CFR §110.11. “Unsolicited electronic email” or “bulk commercial e-mail” is known more commonly as “spam.”³⁰ Email that results from people subscribing to email lists is not unsolicited email. The *Falwell Confidential* is sent via an email list to *subscribers* who want to receive the communication and it is not unsolicited electronic email. Therefore, the *Falwell Confidential* sent by email was not required to contain a disclaimer since it was not an unsolicited communication. Furthermore, LA maintains that requiring the *Falwell Confidential* to contain a disclaimer would violate the First Amendment guarantees of freedom of speech and of the press.³¹

²⁸Electioneering communications are broadcast, cable, or satellite communications. See 11 CFR 100.29.

²⁹The term “public communication,” is defined as:

a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.

11 CFR §100.26 (emphasis added).

³⁰See, e.g. 15 U.S.C. § 7702-03.

³¹“[T]he First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.” *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 797 (1988) (invalidating certain charitable contribution disclosure statements).

IV. NEITHER JERRY FALWELL MINISTRIES NOR LIBERTY ALLIANCE HAVE VIOLATED FEDERAL CAMPAIGN FINANCE RESTRICTIONS ON SOLICITATION.

Although no further argument is necessary once the press exemption is deemed applicable, JFM and LA also submit an additional argument to support the dismissal of the complaint. CLC alleges that JFM and LA have violated 2 U.S.C. § 441b(b)(4)(A)(i), which makes it unlawful "for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families" Thus, neither a corporation nor any PAC that the corporation has established may solicit donations to the PAC except from certain individuals (i.e., stockholders and their families, executive or administrative personnel and their families).

CLC alleges that JFM and LA asked the public for donations to the Campaign for Working Families ("CWF")³² in the *Falwell Confidential* commentary. As mentioned previously, because JFM does not control the *Falwell Confidential* and does not own the falwell.com web site, it cannot be responsible for the donation request to CWF, which describes itself as "a non-partisan political action committee (PAC) dedicated to electing pro-family, pro-life and pro-free enterprise candidates to federal and state offices."³³ Additionally, since the commentary is the personal opinion of Dr. Falwell, LA is not responsible for any statements regarding CWF.

However, even if the statements about CWF were attributed to LA, there would still be no violation. What was intended by § 441b is to prohibit *a corporation or any PAC established by that*

³²Unlike many PACs, CWF's name does not include the words, "Political Action Committee" or "PAC."

³³Campaign For Working Families (visited Aug. 10, 2004) <<http://www.cwfpac.com>>.

25044120002

corporation from soliciting donations to the PAC except from certain individuals. Campaign finance restrictions were not aimed at stopping the occasional endorsement of a multicandidate PAC by an unrelated 501(c)(4) organization, like LA. There were two purposes of § 441b: (1) "to ensure that substantial aggregations of wealth amassed by the special advantages which go with the corporate form of organization should not be converted into political "war chests" which could be used to incur political debts from legislators who are aided by the contributions,"³⁴ and (2) "to protect the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed."³⁵

Donating to CWF only benefits CWF because CWF is not a PAC that is related in any way to LA. Section 441b(b)(4)(A)(i) was designed to stop corporations from soliciting the general public to contribute to their own PACs and from pressuring the corporate employees to contribute to those PACs. CWF and other "multicandidate political committees are generally unrestricted in the manner and scope of their solicitations."³⁶

CLC says that the recommendation of CWF in the *Falwell Confidential* is a "clear violation of the law" without any support for its assertion.³⁷ The undersigned can find no case where a 501(c)(4) organization violated the law by recommending that someone donate to an *independent*

³⁴*Mariani v. U.S.*, 212 F.3d 761, 772 (3d Cir.), cert. denied, 531 U.S. 1010 (2000). See also *United States v. International Union United Auto., Aircraft and Agr. Implement Workers of America*, 352 U.S. 567, 579 (1957).

³⁵*Mariani*, 212 F.3d at 772. See also *United States v. CIO*, 335 U.S. 106 (1948).

³⁶*California Med. Ass'n v. Federal Elec. Com'n*, 453 U.S. 182, 201 (1981).

³⁷See Compl. at 5.

PAC with *no connection* to the organization. In fact, under § 441(c)(2) and (3), a 501(c)(4) organization can even legally spend its own money from a nonsegregated account to engage in "electioneering communications,"³⁸ although other corporations cannot do so. A recommendation by a 501(c)(4) organization that individuals donate to an unrelated PAC by way of a small portion of an email to subscribers is not an evil that § 441b was designed to prohibit. Moreover the cost of sending a portion of such an email or posting part of a web page would be so ridiculously small that it would not be worth calculating the expense.³⁹

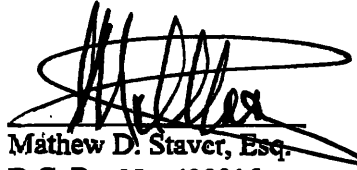
CONCLUSION

Jerry Falwell Ministries, Inc. and Liberty Alliance respectfully request that this complaint be dismissed, that the Commission find that there are no reason to believe that any violations of the Act or the regulations have occurred and that the file be closed immediately.

³⁸Electioneering communications are certain broadcast, cable or satellite communications aired during certain time periods that support or oppose candidates for office. See 2 U.S.C. § 434(f)(3). A 501(c)(4) organization must not be funded by corporations in order to engage in electioneering communications without creating a segregated account. See 2 U.S.C. § 441(c)(3)(B).

³⁹LA does not pay for an outside service to send email or to post on its web site. LA does not pay Dr. Falwell for writing the column. It takes only an estimated 30 minutes of work to format, email and post the weekly *Falwell Confidential* on falwell.com. It is not unusual to claim that email communications are inexpensive. See, e.g., *In re American Muslim Council*, MUR 5281, First General Counsel's Report, p. 7. The report stated: "Although we are not aware of the number or e-mail recipients at this time, we recognize that the cost of the communication, which would form the basis for a civil penalty, likely was minimal." At that time, disclaimers were required for web sites and email containing express advocacy. *Id.* at 4, citing AOs 1995-9, 1999-37.

Respectfully Submitted,



Mathew D. Staver, Esq.

D.C. Bar No. 439315

Fla. Bar. No. 0701092

LIBERTY COUNSEL

210 E. Palmetto Avenue

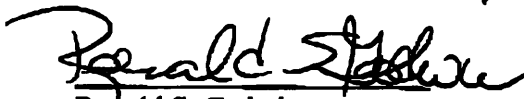
Longwood, FL 32750

407-875-2100

407-875-0770

Counsel for Respondents

All the above statements are true to the best of my knowledge. I understand that a false statement may subject me to penalties of perjury.



Ronald S. Godwin

President, Jerry Falwell Ministries, Inc.



Deryl Edwards

President, The Liberty Alliance, Inc.

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Gary Bauer on the Political Frontlines

Jerry Falwell

Thursday, July 1, 2004

"Always vote for principle, though you may vote alone, and you may cherish the sweetest reflection that your vote is never lost."
— John Quincy Adams

For conservative people of faith, voting for principle this year means voting for the re-election of George W. Bush. The alternative, in my mind, is simply unthinkable.

Story Continues Below

**I built a \$3.8 Million
Business — without
spending a penny to start**

**You Can Do It Too,
Faster and Easier
Than I Did**

Find Out How

To the pro-life, pro-family, pro-traditional marriage, pro-America voters in this nation, we must determine that President Bush is the man with our interests at heart. It is that simple.

The distressing fact regarding this election is, however, that President Bush stands at a political crossroads, with John Kerry ostensibly running neck-and-neck with him in many polls. In addition, Mr. Kerry has raised an astounding \$150 million for his campaign.

So the vote of every conservative is imperative. However, simply voting may not be enough. I believe it is the responsibility of every political conservative, every evangelical Christian, every pro-life Catholic, every traditional Jew, every Reagan Democrat, and everyone in between to get serious about re-electing President Bush.

That is why I am utilizing this column to urge you to support the

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And Lampooned
Never Before

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Cigarette? So
Insane? Well,
not.

● #1 Key for
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Inside Cover

- GOP Seeks
Lawyers to Fight
Kerry's 2,000
'Locusts'
- Kerry Exposes
Mellencamp's
Whopper
- N.Y.C. Welcomes
GOP With 'Kill the
President' Play
- New Attack on
Swift Boat Vets
- Democrats
Immediately Attack
Goss
- Kerry Campaign
Rocked by Swiftvet
Cambodia
Questions
- Castro Backs
Kerry
- Physicist.
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Stockpile Enough
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- Kerry-Edwards
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Campaign for Working Families, which is headed by Gary Bauer. It is the organization that I believe can have the greatest impact in re-electing Mr. Bush to the Oval Office.

Mr. Bauer recently stated, "John Kerry's success, not to mention the incessant negativism of the nightly news outlets, is beginning to take its toll. President Bush's approval ratings are dropping — even on the crucial issues of foreign policy and national security!"

He noted also that radical leftist groups such as MoveOn.org, Emily's List and the Human Rights Campaign are unremittingly working to defeat President Bush. Furthermore, the left has been facilitated by billionaire George Soros and Hollywood liberals who despise our President.

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"Weeks ago," he said, "it seemed we were guaranteed to gain seats in the Senate. Now we're on the defensive. Our majority in the House once seemed secure, greatly aided by redistricting in Texas. But with two consecutive losses in special elections, the Democrats are raking in money hand-over-fist. Unfortunately, we are not."

Our action is urgently needed.

I am urging everyone reading this column today to take a moment to send a financial gift to the Campaign for Working Families in order to help in the crucial election of President Bush and conservative political leaders across this nation.

I honestly believe that it is essential that we flood Campaign for Working Families with financial help in order to secure our future. This organization that is on the frontlines on our behalf can accept contributions up to \$5,000 per person, but even small gifts are important and quickly add up when we join together.

Please, right now, pick up your phone and call 703-671-8800 or visit the Campaign for Working Families website (https://www.cwfpac.com/cwf_contribution.htm) to make a generous donation by credit card. In addition, may we pray fervently each day for the re-election of George W. Bush at this critical time in our nation's history.

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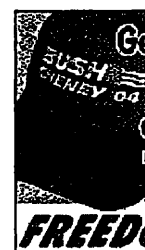
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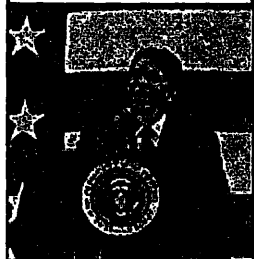
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WorldNetDaily™

Saturday, July 3, 2004

**LISTEN AMERICA
REV. JERRY FALWELL**

Time to open wallets for Bush

Posted: July 3, 2004
1:00 a.m. Eastern

By Rev. Jerry Falwell

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EXHIBIT**2**

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Rev. Jerry Falwell, a nationally recognized Christian minister and television show host, is the founder of Jerry Falwell Ministries and is chancellor of Liberty University in Lynchburg, Va.

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Posted on Wed, Jun. 16, 2004

KERRY FOR PREZ: WHY HIM, WHY NOW

AND HOW TO PUT HIM IN THE WHITE HOUSE

LAST WEEK, the nation looked to the past with the death of President Ronald Reagan

This week, the presidential campaigns of George W. Bush and John F. Kerry, suspended in respect to the deceased 40th president, start fresh.

In that spirit, this newspaper, the first in the nation, endorses **John Kerry** for president. In the current White House occupant, Kerry can lead America to a brighter, better future. He has the personal courage, compassion, intellect and skill to lead this country in a time of war and economic troubles at home. He is a serious man for a serious time.

Why make this endorsement now, when the election is months away?

Because this race promises to be close and Pennsylvania is one of 18 swing states that can go to either candidate. For Kerry supporters to prevail they must do more than just vote, they must bring a ringer into this contest: the more than a million people in the region who did not vote in the last presidential election. We believe these non-voters - who will have to be mobilized over the next few months - are the key to victory.

On the next page, we outline a strategy to make sure Pennsylvania lands in the Kerry win column. We will further make the case for Kerry in future editorials.

For now, let's concentrate on the current president and why he must be defeated.



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THE CASE AGAINST BUSH

George W. Bush received - and deserved - praise for his leadership during the dark d immediately following the Sept. 11 terrorist attacks.

But since then, the Bush administration has been marked by failure - failure to shept country through a tough economic downturn, failure to keep the nation focused on th enemies to our security.

He has failed in even the one challenge he set out for himself at the beginning of his - to bring the country together. His has been one of the most ideologically driven and administrations in recent times.

Instead of moving forward, the country has been on the wrong track. These last four been wasted.

Bush wasted the opportunity to lead an international movement against al Qaeda, th threat. Instead he has led us, with false intelligence, into a senseless war. In less th the United States will hand over control of Iraq to the Iraqis. But our troops will rema have to remain for years to come.

After the Sept. 11 attacks, there was a sense of national unity. Bush wasted the mor deciding to appease the most strident in his conservative base, opposing gay marria abortion information and giving comfort to the more irresponsible voices in the Natio Association.

Bush was left with a trillion-dollar surplus at the end of the Clinton administration. T took the money and wasted it with tax cuts for the wealthiest. As the deficits rose to the "tax cuts fix everything" ideology prevented his administration from changing wh the wrong course.

While the last three months have seen an increase in new jobs, there still is a net do Bush years. Many of the new jobs pay less. Health- care costs are skyrocketing, the uninsured is rising. People are struggling and, in a second Bush administration, woul more.

The Office of Management and Budget has warned federal agencies of big cuts to vet Head Start and - yes - homeland security.

Conveniently for Bush's campaign, those cuts will occur after Americans vote Nov. 2.

THE CASE FOR KERRY

Given the challenges, whom should we trust to lead the nation for the next four year whose incompetence helped create some of the problems?

No. We have a much better choice in Sen. John Kerry.

John Kerry's long life in the national spotlight has been defined by steadfast support principled and intelligent use of American power in the world. His proposals - not to r administration that he will create - promise new hope for America.

Like Bush, Kerry was born to wealth and privilege. Like Bush, he went to prep school Yale. But in little else since then has Kerry been like Bush, who acts as if his presidential birthright left over by his father.

Kerry acknowledges that his privileges left him with a responsibility to serve and an : lead. And he has - from combat in the Navy, then as the cleancut (and therefore high leader of the Vietnam veterans' anti-war movement, as a prosecutor in Boston, and i the U.S. Senate.

He is not the indecisive waffler the Bush team would have you believe. Instead, he is concrete, pragmatic direction for the nation.

On the issue of high unemployment he is proposing changing the tax laws that give l incentives to outsource jobs to India and China.

Kerry promises to roll back the Bush tax cuts for people making more than \$200,000 the federal deficit and help pay for his health-care program, which seeks to expand c will withdraw the special privileges given to polluting industries and the oil companies toward freeing ourselves from dependence on oil from the Middle East.

On homeland security, Kerry understands that if we are attacked again, the first to r firefighters and emergency medical teams, which have been largely ignored by the B administration. Kerry is proposing recruiting an additional 100,000 firefighters. Bill Cl same with police during his term. Afterward, crime went down across the country. Cc Hardly.

On Iraq, there's little evidence that Bush can enlist the international help necessary t of our troops home. There's reason to believe that Kerry, who understands the huma will.

Kerry's personal style is, to put it mildly, reserved in public. But outside of the public shows an engaging and energetic Yankee spirit as he rides a motorcycle, skis and sn plays hockey and flies his own plane.

Because he respects the intelligence of the American people, he rarely talks in sound

He understands that sound bites aren't solutions. Kerry's positions, while sometimes are grounded in reality, not in doctrines developed in think tanks.

He has surrounded himself with advisers, many from the Clinton administration, who world experience on the economy, national security and on fighting terror. They know wars. They did it in Bosnia and Kosovo, wars where we actually had an exit strategy.

Kerry, who fought in the swamps of Vietnam, can lead us out of the quagmire of the administration - but for that to happen, he will need your help.

THE STRATEGY

Past presidential election strategies focused on the "undecided" or "swing" voters. Th we're pushing a different strategy: We're focusing on the people poll-takers call "unli

For more information about registering, voting, or the election process in general, check the Web site of the Committee of Seventy listed above.

WHAT YOU NEED TO DO SOON

Get others to register to vote.

You can do this on your own: Talk to friends, relatives, fellow members of your church or mosque.

Or you can volunteer for an organized voter-registration effort.

AmericaVotes.org is a national coalition of progressive organizations spearheading registration and mobilization. At least two affiliates are active in Philadelphia:

- Association of Community Organizations for Reform Now (ACORN), the longtime civil rights activist organization. To get involved, call 215-765-0042.

- ACT (America Coming Together) is a coalition of nonpartisan, progressive organizations voter registration and turnout drive that they say is unprecedented, using new technology to identify voters.

ACT intends to follow up registrations with personal contact with voters to talk about the upcoming run was the Philadelphia mayoral race, in which it claimed a higher-than-average coalition can be reached at 215-922-0112 or its Web site (**www.act4victory.org**).

Other organizations - unions, anti-gun groups, environmental, civil-rights, pro-choice - have their own voter mobilization drives. Join one.

Finally, you can learn more about Kerry, make a donation or volunteer to help through the site: **www.johnkerry.com**.

You can help Kerry win Pennsylvania.

Act now.

The commonwealth - indeed the nation - cannot afford another four years of George

GOT AN ISSUE WITH OUR ISSUE?

AGREE OR disagree with our endorsement of John Kerry?

Let us know.

Send us your thoughts, along with an address and day and evening phone number we can call to verify your message. You can reach us by e-mail (**views@phillynews.com**), fax (215-854-5691) or regular mail (Views, Box 7788, Philadelphia, PA 19101)

According to polls, actual swing voters - people who could vote for either President Bush or Kerry - have dwindled to an overrated few.

But there are 18 "swing" states that are the keys to victory for John Kerry. These are states that Bush or Al Gore won by 6 percent or less of the vote, states where the number of votes for Bush or Kerry are evenly matched. These are the battleground states.

Several important states, like New Jersey, are firmly in Kerry's corner. Pennsylvania, with its many electoral votes, is one of the most critical and hotly contested.

Four years ago in Pennsylvania, Gore got 2.4 million votes, Bush got 2.2 million and Clinton got 103,392.

But 4 million people didn't vote for any of them.

The goal is to find among those 4 million non-voters new Kerry supporters and get them to vote by Oct. 4 and then vote on Nov. 2. In this goal, the Philadelphia region is crucial.

While the rest of the state tilts heavily Republican, Philadelphia has a rich vein of Democratic voters which has not always been mined. It's because of Philadelphia voters that Clinton and Gore won the state in the past.

For sure, workers for President Bush are busy registering voters and working hard in other parts of the state.

The contest is engaged.

WHAT YOU NEED TO DO NOW

Make sure you are registered to vote.

The deadline is Oct. 4, but do it now.

If you haven't voted in the last several elections or you've moved, call your county board of elections to make sure you're properly registered.

To get a list of addresses and phone numbers for each county, check the Web site of the Committee of Seventy (www.seventy.org) or the the state (www.dos.state.pa.us).

If you know you're not registered, pick up a registration form at a state store, library or community center, fill it out, sign it and send it to your county board of elections. (Find the address on the above Web sites.)

You also can get a registration form online by going to www.dos.state.pa.us/voter.

Make sure you fill in all the blanks and sign the form. You must use regular mail to send it in.

A quick recommendation from Bob Lee, Philadelphia's voter registration administrator: Fill out the blank form and fill it in by hand. Don't use the form that you can fill out on the computer. It's a different size from the standard form and takes more time to process.

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